IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

CALIFORNIA FAIR POLITICAL PRACTICES COMMISSION, Petitioner, v. **THE SUPERIOR COURT OF SACRAMENTO COUNTY,** Respondent, **CITIZENS TO SAVE CALIFORNIA; Assembly Member KEITH RICHMAN, M.D.; ARNOLD SCHWARZENEGGER, Governor, in his individual capacity; GOVERNOR SCHWARZENEGGER'S CALIFORNIA RECOVERY TEAM; SENATOR JOHN CAMPBELL; RESCUE CALIFORNIA FROM BUDGET DEFICITS; and TAXPAYERS FOR RESPONSIBLE PENSIONS,** Real Parties in Interest.	(Related Appeal Pending - Not Yet Docketed)

Sacramento County Superior Court No. 05AS00555
The Honorable Shelleyanne W.L. Chang, Judge
[Department 32 - (916) 874-5682]

PETITION FOR WRIT OF SUPERSEDEAS; REQUEST FOR IMMEDIATE STAY OF ORDER DATED MAY 2, 2005, DECLARING PRELIMINARY INJUNCTION STAYED ON APPEAL TO BE CURRENTLY IN EFFECT, PENDING DETERMINATION OF THIS PETITION; AND MEMORANDUM OF POINTS AND AUTHORITIES (ACCOMPANIED BY EXHIBITS IN SUPPORT THEREOF)

BILL LOCKYER
Attorney General of the State of California
LOUIS R. MAURO
Senior Assistant Attorney General
CHRISTOPHER E. KRUEGER
Supervising Deputy Attorney General
DOUGLAS J. WOODS
Deputy Attorney General, State Bar No. 161531
1300 I Street
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-4663
Fax: (916) 324-5567

Attorneys for Petitioner

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Petitioner,
v.
THE SUPERIOR COURT OF SACRAMENTO COUNTY,
Respondent,
CITIZENS TO SAVE CALIFORNIA; Assembly Member KEITH RICHMAN, M.D.; ARNOLD SCHWARZENEGGER, Governor, in his individual capacity; GOVERNOR SCHWARZENEGGER'S CALIFORNIA RECOVERY TEAM; SENATOR JOHN CAMPBELL; RESCUE CALIFORNIA FROM BUDGET DEFICITS; and TAXPAYERS FOR RESPONSIBLE PENSIONS,
Real Parties in Interest.

RELATED APPEAL PENDING

An appeal related to this Petition is pending but not docketed in this Court. The appeal, entitled *California Fair Political Practices Commision v. Citizens to Save California, et al.,* is from the preliminary injunction order entered on April 18, 2005, by the Sacramento County Superior Court in case number 05AS00555.

REQUEST FOR IMMEDIATE TEMPORARY STAY:

AN IMMEDIATE TEMPORARY STAY IS URGENTLY NEEDED PENDING THIS COURT'S DETERMINATION ON THE PRESENT PETITION

Petitioner California Fair Political Practices Commission (the "FPPC") requests an immediate temporary stay of the Sacramento County Superior Court's order yesterday declaring the Superior Court's prior preliminary injunction to be "currently in full force and effect," despite the automatic stay that became effective upon the FPPC's appeal on April 19, 2005. As a result of yesterday's order, the FPPC is in the untenable position of (1) being obligated to *enforce* section 18530.9 of Title 2 of the California Code of Regulations by virtue of its appeal of the mandatory preliminary injunction order entered in the underlying action, while at the same time (2) being subject to the Superior Court's post-appeal order declaring the current effectiveness of the terms of the original preliminary injunction *against enforcement* of Regulation 18530.9 notwithstanding the automatic stay. As a result, an immediate temporary stay of yesterday's order is necessary pending this Court's determination on the present Petition.

Effective November 3, 2004, Regulation 18530.9 subjects ballot measure committees controlled by state candidates to the same statutory contribution limits applicable to the controlling candidates. On April 18, 2005, the Superior Court issued a preliminary injunction against FPPC enforcement of Regulation 18530.9 on First Amendment grounds. Ex. 2, pp. 29-31. Upon obtaining a copy of the preliminary injunction order on April 19, 2005, the FPPC immediately filed its notice of appeal. Ex. 3, pp. 33-35. Because the preliminary injunction undeniably would radically alter, rather than preserve, the status quo that existed prior to the onset of the underlying action (as explained below), the preliminary injunction is "mandatory" and is

automatically stayed on appeal; it does not fall within the exception to the rule of automatic stay that has been carved out for appeals of injunctions that are "prohibitory." *See, e.g., Paramount Pictures Corp. v. Davis*, 228 Cal. App. 2d 827, 835-836 (1964).

In response to the FPPC's notice that Regulation 18530.9 remains in full force and effect during the pendency of the appeal, the real parties in interest (plaintiffs and intervenor plaintiffs below are state candidates and ballot measure committees) filed ex parte application papers on April 25, 2005, seeking a temporary restraining order enjoining further violations of the preliminary injunction, an order to show cause re monetary sanctions, and alternatively, an order to show cause re contempt. Exs. 4-5, pp. 37-88. At the April 25th ex parte hearing, the Superior Court took the application under submission, and on May 2, 2005, the Superior Court issued a new order declaring its preliminary injunction to be "currently in full force and effect," and denying the application "without prejudice to Plaintiffs and/or Plaintiff/Intervenors to apply for an Order to Show Cause re: Contempt with a showing of specific violations by the Fair Political Practices Commission" of the preliminary injunction. Ex. 7, pp. 110.

Determination of application of the automatic stay and identification of an injunction as mandatory or prohibitory are the province of the appellate courts, however, not the Superior Court. The Supreme Court has held:

> It is, of course, elementary that this court will not be bound by the form of the order but will look to its substance to determine its real nature. It is equally well established that a mandatory injunction is automatically stayed by the perfecting of an appeal and that thereafter the lower court is without jurisdiction to compel obedience to the order from which the appeal has been taken. . . . There would, of course, be no need for the issuance of any writ if the lower court was not mistakenly attempting to enforce obedience to the order appealed from.

Feinberg v. Doe, 14 Cal. 2d 24, 28 (1939) (citations omitted). The FPPC has filed the present Petition to obtain this Court's confirmation of the *existing* operation of the automatic stay and, correspondingly, to obtain a writ of supersedeas to prevent further Superior Court proceedings enforcing the preliminary injunction until this Court has ruled on appeal.

Plaintiffs have now demanded that the FPPC cease enforcement of Regulation 18530.9 immediately, or face institution of contempt proceedings pursuant to the Superior Court's order yesterday. Exhibits 8-9, pp. 113-123.

Until this Court's rules upon the FPPC's Petition for writ of supersedeas, however, the FPPC is faced with two competing obligations: (1) the obligation to enforce Regulation 18530.9 while the preliminary injunction is automatically stayed on appeal, which the present Petition seeks to uphold, and (2) the obligation to comply with the Superior Court's incorrect order that the FPPC is subject to the terms of the original preliminary injunction. As a result, an immediate temporary stay is necessary to stop further enforcement proceedings on the preliminary injunction in the Superior Court and to preserve the jurisdiction of this Court pending the determination on the present Petition. *See Paramount Pictures Corp.*, 228 Cal. App. 2d at 833 n.2 (temporary stay issued by Court of Appeal pending determination of application for writ of supersedeas to confirm mandatory nature of preliminary injunction).

For these reasons, the FPPC requests an immediate temporary stay of the Superior Court's order yesterday declaring its prior preliminary injunction to be "currently in full force and effect" pending this Court's determination on the present Petition.

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INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner FPPC by this Petition seeks a writ of supersedeas directing the respondent Sacramento County Superior Court to cease all enforcement proceedings in connection with its preliminary injunction entered on April 18, 2005, which is the subject of a pending appeal to this Court and thus automatically stayed. Review by extraordinary writ is necessary because the FPPC has no adequate remedy at law and will suffer irreparable injury in the absence of this Court's intervention.

As described briefly, above, the underlying litigation in this matter involves a challenge to section 18530.9 of Title 2 of the California Code of Regulations, which subjects ballot measure committees controlled by state candidates to the corresponding statutory contribution limits applicable to the controlling candidates. The FPPC has authority and responsibility for enforcement of Regulation 18530.9. Plaintiffs and intervenor plaintiffs below (collectively, "plaintiffs") sought a preliminary injunction against enforcement of Regulation 18530.9, arguing *inter alia*, that it is unconstitutional on its face under *Citizens Against Rent Control, Inc. v. City of Berkeley*, 454 U.S. 290 (1981), and that they are irreparably harmed by the contribution limits' chilling effect on their First Amendment speech and association rights. Ex.1, pp. 20, 23-24.

In opposition, the FPPC argued, *inter alia*, that plaintiffs offered no explanation as to how the challenged contribution limits harmed their First Amendment interests by preventing plaintiffs from "amassing the resources necessary for effective advocacy" – the First Amendment standard applicable to contribution limits, dating back to *Buckley v. Valeo*, 424 U.S. 1, 21 (1976). Ex.1, p. 25. How do the challenged contribution limits prevent plaintiffs from obtaining enough money to accomplish effective advocacy? This is the crucial preliminary injunction irreparable harm questions the FPPC pressed, and

plaintiffs did not answer. The FPPC also argued, regardless of the question of alleged harm, that Regulation 18530.9 easily satisfied "the lesser demand of being closely drawn to match a sufficiently important interest," as that standard was reaffirmed and applied in the Supreme Court's most recent contribution limits decision in *McConnell v. Federal Election Commission*, 540 U.S. 93, 136, 182 (2003). Ex. 1, p. 5. The FPPC also argued that Government Code section 11350(d) limited the evidentiary record that could be considered in support of plaintiffs' challenge to enforcement of a regulation. *See* Ex. 1, p. 12.

Agreeing with the FPPC on the threshold issue, the Superior Court was "easily persuaded that the prevention of candidate corruption, the appearance of corruption, and/or circumvention of applicable campaign contribution limits are all 'sufficiently important' governmental purposes." Ex. 1, p. 21. The Superior Court nonetheless went on to rule that plaintiffs' declarations alleging a First Amendment "chill" presented an irreparable harm (finding the evidentiary limitation of Government Code section 11350 inapplicable to plaintiffs' constitutional claims), and that Regulation 18530.9 is "not closely drawn to match the identified governmental purposes." Ex. 1, pp. 20-26. The Superior Court proceeded to enter a preliminary injunction enjoining the FPPC "from administering and/or enforcing Regulation 18530.9" and "from proceeding with any investigation of Citizens with respect to whether Citizens or Governor Schwarzenegger has violated Regulation 18530.9." Ex. 2, pp. 29-31.

In any event, aside from providing the context for the present Petition, the Superior Court's errors in ordering the preliminary injunction are not at issue here; they instead will be the subject of the FPPC's arguments on appeal, which appeal was filed immediately upon the FPPC's receipt of the preliminary injunction order. Ex. 3, pp. 33-35. The need for the present Petition arises in

that plaintiffs and the Superior Court have challenged the automatic stay that resulted, by operation of law, from the FPPC's appeal of the preliminary injunction order.

The general rule, of course, is that the effect of an order is stayed upon appeal. In response to the FPPC's notice that Regulation 18530.9 remains in full force and effect during the pendency of the appeal, plaintiffs filed ex parte application papers seeking a temporary restraining order enjoining further "violations" of the preliminary injunction, an order to show cause re "substantial monetary sanctions," and alternatively an order to show cause re contempt. Exs. 4-5, pp. 37-88. Plaintiffs argued that the preliminary injunction issued here came within the exception to the rule of automatic stay that has been carved out for appeals of injunctions that are "prohibitory." As set forth in detail below, however, a preliminary injunction that radically alters, rather than preserves, the status quo is "mandatory," even if couched in "prohibitory" terms. Importantly, *plaintiffs do not dispute that the preliminary injunction would radically alter the status quo*. Instead, plaintiffs ignore over a century of California jurisprudence and argue that reference to an injunction's effect on the status quo should not enter into consideration as to whether the injunction is mandatory or prohibitory. Notwithstanding the defects in plaintiffs' argument, the Superior Court issued a new order yesterday declaring its preliminary injunction to be "currently in full force and effect," and allowing plaintiffs leave to re-file their application for an Order to Show Cause re: Contempt upon "a showing of specific violations by the Fair Political Practices Commission" of the preliminary injunction. Ex. 7, pp. 110.

Under a threat of contempt proceedings, plaintiffs are demanding that the FPPC immediately cease enforcement of Regulation 18530.9. Exs. 8-9, pp. 113-123. Unless this Court issues a writ of supersedeas directing the Superior Court to cease all enforcement proceedings in connection with its preliminary

injunction pending this Court's determination on the FPPC's appeal, the FPPC will continue to be subject to Superior Court enforcement action taken in excess of the Superior Court's jurisdiction.

PETITION FOR WRIT OF SUPERSEDEAS

Authenticity Of Exhibits.

1. All exhibits accompanying this Petition are true or facsimile copies of documents on file with Respondent Superior Court except Exhibits 8 and 9, which are copies of letters received from opposing counsel. The FPPC's counsel today requested preparation of the reporter's transcript of the hearing on April 25, 2005, in connection with plaintiffs' ex parte application seeking a temporary restraining order enjoining further violations of the preliminary injunction, an order to show cause re substantial monetary sanctions, and alternatively an order to show cause re contempt. The FPPC's counsel has not yet received an estimated date of completion from the court reporter. The exhibits are incorporated herein as though fully set forth in this Petition and Memorandum. The exhibits are paginated consecutively from page 1 through page 123, and page references in this Petition and Memorandum are to the consecutive pagination.

Beneficial Interest Of Petitioner; Capacities Of Respondent And Real Parties In Interest.

2. Petitioner California Fair Political Practices Commission (the "FPPC") is the defendant in an action now pending in Respondent Sacramento County Superior Court entitled *Citizens to Save California, et al. v. California Fair Political Practices Commission*, Sacramento County Superior Court Case No. 05AS00555. The FPPC names plaintiffs Citizens to Save California and Assembly Member Keith Richman, M.D. and intervenor plaintiffs Governor Arnold Schwarzenegger, Governor Schwarzenegger's California Recovery

Team, Senator John Campbell, Rescue California from Budget Deficits, and Taxpayers for Responsible Pensions (collectively, "plaintiffs") as the Real Parties in Interest.

Chronology Of Pertinent Events.

3. Section 18530.9 of Title 2 of the California Code of Regulations ("Regulation 18530.9") was adopted on June 25, 2004, and made effective as of November 3, 2004. Its provisions subject ballot measure committees controlled by state candidates to the corresponding statutory contribution limits applicable to the controlling candidates.

4. Following initiation of plaintiffs' action in the Sacramento County Superior Court asserting a facial challenge to the validity of Regulation 18530.9, the Superior Court issued a preliminary injunction on April 18, 2005, against FPPC enforcement of Regulation 18530.9 on First Amendment grounds. Ex. 2, pp. 29-31. The Superior Court's order enjoined the FPPC "from administering and/or enforcing Regulation 18530.9" and "from proceeding with any investigation of Citizens with respect to whether Citizens or Governor Schwarzenegger has violated Regulation 18530.9." Ex. 2, p. 30.

5. Upon obtaining the preliminary injunction order on April 19, 2005, the FPPC immediately filed its notice of appeal. Ex. 3, pp. 33-35. Because the preliminary injunction is "mandatory" in nature, it was automatically stayed, by operation of law, upon the FPPC's appeal.

6. In response to the FPPC's notice that Regulation 18530.9 remains in full force and effect during the pendency of the appeal, plaintiffs filed ex parte application papers on April 25, 2005, seeking a temporary restraining order enjoining further "violations" of the preliminary injunction, an order to show cause re "substantial monetary sanctions," and alternatively an order to show cause re contempt. Exs. 4-5, pp. 37-88. The FPPC filed its opposition to plaintiffs' application that same day. Ex. 6, pp. 90-108.

7. Following the April 25th ex parte hearing, on May 2, 2005, the Superior Court issued a new order declaring its preliminary injunction to be "currently in full force and effect," and denying plaintiffs' application "without prejudice to Plaintiffs and/or Plaintiff/Intervenors to apply for an Order to Show Cause re: Contempt with a showing of specific violations by the Fair Political Practices Commission" of the preliminary injunction. Ex. 7, pp. 110-111.

Absence Of Other Remedies.

8. The FPPC has filed the present Petition to obtain this Court's confirmation of the *existing* operation of the automatic stay and, correspondingly, to obtain a writ of supersedeas to prevent further Superior Court proceedings enforcing the preliminary injunction until this Court has ruled on appeal. Plaintiffs have now demanded that the FPPC cease enforcement of Regulation 18530.9 immediately, or face institution of contempt proceedings pursuant to the Superior Court's order yesterday. Exs. 8-9, pp. 113-123. Given the Superior Court's challenge to the automatic stay, the FPPC is in the untenable position of (1) being obligated to *enforce* section Regulation 18530.9 by virtue of its previous appeal of the mandatory preliminary injunction order entered in the underlying action, while at the same time (2) being subject to the Superior Court's subsequent order declaring the current effectiveness of the terms of the original preliminary injunction *against enforcement* of Regulation 18530.9 notwithstanding the automatic stay of the original preliminary injunction on appeal. "[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers). The Superior Court is mistakenly requiring obedience to the mandatory preliminary injunction stayed by appeal, and the FPPC's only recourse is to seek a writ of supersedeas from this Court by the present Petition.

PRAYER

The FPPC prays that this Court:

1. Immediately stay the Superior Court's order yesterday and any further Superior Court enforcement proceedings on the preliminary injunction order entered on April 18, 2005, pending this Court's determination on the present Petition;

2. Issue a writ of supersedeas directing the Superior Court (1) to vacate its order issued yesterday, (2) to enter a new order denying *with prejudice* plaintiffs' ex parte application dated April 25, 2005, seeking a temporary restraining order enjoining further violations of the preliminary injunction, an order to show cause re substantial monetary sanctions, and alternatively an order to show cause re contempt. plaintiffs' granting the motion for judgment on the pleadings, and (3) to cease any further enforcement proceedings on its preliminary injunction order entered on April 18, 2005, pending this Court's determination on the FPPC's appeal of the preliminary injunction order;

3. Award the FPPC its costs, including those contemplated by Government Code section 6103.5; and

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4. Grant such other relief as may be just and proper.

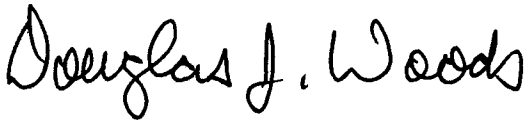
Dated: May 3, 2005

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California

LOUIS R. MAURO
Senior Assistant Attorney General

CHRISTOPHER E. KRUEGER
Supervising Deputy Attorney General



DOUGLAS J. WOODS
Deputy Attorney General

Attorneys for Petitioner

VERIFICATION

I, Douglas J. Woods, declare as follows:

I am a Deputy Attorney General for the State of California and am one of the attorneys for the FPPC in this litigation. I have read the foregoing Petition for Writ of Supersedeas, Request for Immediate Temporary Stay Pending Determination of this Petition, Introduction, and the supporting Memorandum below and know their contents. The facts alleged in the Petition, Request, Introduction, and Memorandum are within my own knowledge and I know these facts to be true. Because of my familiarity with the relevant facts pertaining to the lower court proceedings, I, rather than the FPPC, verify this Petition, Request for Immediate Temporary Stay, Introduction, and Memorandum.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this verification was executed on May 3, 2005, at Sacramento, California.

Douglas J. Woods

DOUGLAS J. WOODS

MEMORANDUM OF POINTS AND AUTHORITIES

Petitioner California Fair Political Practices Commission (the "FPPC") seeks a writ of supersedeas directing the Superior Court to vacate its order issued yesterday and to cease any further enforcement proceedings on the preliminary injunction order entered on April 18, 2005, pending this Court's determination on the FPPC's appeal of the preliminary injunction order. Because the underlying preliminary injunction order was automatically stayed, by operation of law, upon the FPPC's appeal, the Superior Court is without jurisdiction to proceed with enforcement.

Subject to certain express statutory exceptions, perfection of an appeal operates to stay trial court proceedings on the order appealed from. Code Civ. Proc. § 916(a). It is undisputed that none of the express statutory exceptions to the automatic stay apply here, but plaintiffs nonetheless contend, and the Superior Court has now found, that the additional, court-made exception to the automatic stay for "prohibitory" injunctions is applicable. Plaintiffs' argument, however, would elevate semantic form over substance, directly contrary to the admonitions contained in the very case law upon which plaintiffs rely. Because the preliminary injunction entered in this action would disturb, rather than preserve, the status quo that existed prior to the litigation, the injunction is "mandatory," not "prohibitory," and it is thus automatically stayed by the appeal.

Consistent with the general rule, a preliminary injunction that is "mandatory" is stayed automatically by appeal; a "prohibitory" preliminary injunction, however, is not. *Agricultural Labor Relations Board v. Superior Court*, 149 Cal. App. 3d 709, 712 n.2 (1983). Notwithstanding the Superior Court's order yesterday declaring its prior preliminary injunction to be "currently in full force and effect," determination of application of the automatic stay and identification of an injunction as mandatory or prohibitory

are the province of the Court of Appeal, not the Superior Court:

> It is, of course, elementary that this court will not be bound by the form of the order but will look to its substance to determine its real nature. It is equally well established that a mandatory injunction is automatically stayed by the perfecting of an appeal and that thereafter the lower court is without jurisdiction to compel obedience to the order from which the appeal has been taken. . . . There would, of course, be no need for the issuance of any writ if the lower court was not mistakenly attempting to enforce obedience to the order appealed from.

Feinberg v. Doe, 14 Cal. 2d 24, 28 (1939) (citations omitted).

The preliminary injunction against enforcement of Regulation 18530.9 entered in this matter is mandatory in that it would disturb the status quo that existed prior to the litigation – both in terms of actual events and in terms of the relationship between plaintiffs and the FPPC. The FPPC has filed the present Petition to obtain this Court's confirmation of the *existing* operation of the automatic stay and, correspondingly, to obtain a writ of supersedeas to prevent further Superior Court proceedings enforcing the preliminary injunction until this Court has ruled on appeal.

I.

THE NATURE OF AN INJUNCTION IS DETERMINED BY ITS SUBSTANTIVE EFFECT ON THE STATUS QUO

In one of the leading authorities, the court explained the well-established rule that courts are not bound by the *form* of the order, but instead look to its *substance* to determine whether it is mandatory or prohibitory:

> An injunction is prohibitory if it merely has the effect of preserving the subject of the litigation *in status quo*, while generally it is mandatory if it has the effect of compelling performance of a substantive act and necessarily contemplates a change in the relative rights of the parties at

> the time injunction is granted. If an injunction compels a party to surrender a position he holds and which upon the facts alleged by him he is entitled to hold, it is mandatory. An injunction is prohibitory if its effect is to leave the parties in the same position as they were prior to the entry of the judgment, while it is mandatory in effect if its enforcement would be to change the position of the parties and compel them to act in accordance with the judgment rendered.

Paramount Pictures Corp. v. Davis, 228 Cal. App. 2d 827, 835-836 (1964) (quoting *Dosch v. King*, 192 Cal. App. 2d 800, 804 (1961)); *see also Shoemaker v. County of Los Angeles*, 37 Cal. App. 4th 618, 623, 625 (1995). The simplistic "blowing smoke" analysis provided by "one respected commentator" cited in plaintiffs' opening paragraph of their application brief (Ex. 4, p. 54) is precisely the form-over-substance approach the courts have rejected. Unfortunately, it is this erroneous analysis that the Superior Court apparently adopted in issuing its order yesterday.[1/] Consistent with the definition explained in *Paramount Pictures*, the preliminary injunction order issued here would change the status quo and is thus mandatory.

II.

THE INJUNCTION HERE WOULD CHANGE THE RELATIONSHIP OF THE PARTIES, DISTURBING THE STATUS QUO

Before this case began, Regulation 18530.9 was in effect, and ballot measure committees controlled by state candidates were subject to the applicable contribution limits. On the face of things, and as contended by plaintiffs, candidates did not control ballot measure committees that were accepting contributions above the limits set for controlled committees, and

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1. The Superior Court issued its ruling declaring its prior preliminary injunction to be "currently in full force and effect," but provided no analysis of the parties' respective arguments in its ruling. Ex. 7, pp. 110.

ballot measure committees controlled by candidates did not accept contributions in excess of the applicable limits. In contrast, *upon entry of the preliminary injunction order*, (but for the FPPC's appeal) plaintiff candidates would be free to control plaintiff ballot measure committees or any other ballot measure committees, and such ballot measure committees would be able to receive contributions in unlimited amounts without restriction by the FPPC. As a result, following *Paramount Pictures*, the preliminary injunction would create "a change in the relative rights of the parties," would "compel [the FPPC] to surrender a position it holds and which upon the facts alleged by the FPPC it is entitled to hold," and would not "leave the parties in the same position as they were prior to the entry of the judgment." If the preliminary injunction were in effect, it would recast the relationship between the parties and thereby disturb the status quo.

Stated simply, before the litigation began, contributors to controlled ballot measure committees gave, at most, $22,300. If the preliminary injunction were not stayed by the notice of appeal, money in unlimited amounts would leave the hands of contributors and go into the hands of plaintiff ballot measure committees, which would nonetheless be subject to control by the plaintiff candidates. The FPPC would be powerless to intervene. It is undeniable that this is exactly the fundamental change in the status quo that plaintiffs sought by their action, and the preliminary injunction must thus be considered mandatory.

III.

THE INJUNCTION HERE WOULD CHANGE ACTUAL EVENTS, DISTURBING THE STATUS QUO

Also consistent with the *Paramount Pictures* explication, the preliminary injunction order issued here would compel FPPC performance of "substantive acts."

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First, just as a basic matter of public notice, the injunction would require the FPPC to take steps to inform the public of the changed status of Regulation 18530.9. Indeed, even prior to actual entry of the preliminary injunction order, the FPPC responded to the Court's March 25th ruling on the motion by announcing on its website that the Court had found the regulation unenforceable, but that the status of the regulation was subject to change due to the ongoing litigation. Ex. 6, pp. 106-107. Upon entry of the actual preliminary injunction order, the FPPC announced that the order had been entered, but clarified that the appeal operated to stay application of the preliminary injunction order. *Id.* "All are entitled to be informed as to what the State commands or forbids." *People v. Acuna*, 77 Cal. App. 4th 1056, 1061 (2000) (quoting *Keeler v. Superior Court*, 2 Cal. 3d 619, 633-634 (1970)). Required public notice in response to the preliminary injunction would be a "substantive act" rendering the injunction mandatory.

Second, Government Code section 83113(b) imposes an ongoing obligation upon the FPPC to "[p]repare and publish manuals and instructions . . . explaining the duties of persons and committees under this title." As a result, the preliminary injunction order would require (if it were not stayed) the FPPC to revise and re-distribute its existing fact sheets, to report the injunction in the FPPC Bulletin, and to revise existing materials used at FPPC informational workshops. Ex. 6, p. 107. Section 83113(e) of the Government Code, in particular, requires annual publication of a guidance booklet not later than March 1st. If the preliminary injunction were not stayed by the appeal, the FPPC would proceed to publish a supplemental insert to the required booklet describing the effect of the injunction on Regulation 18530.9. *Id.* Moreover, revisions to any FPPC manuals require formal Commission action at a public meeting, and may entail advance interested persons' meetings. Cal. Code Reg., tit. 2, § 18313. Revisions to required public guidance in response to the

preliminary injunction, including the required formal meetings and formal Commission actions would be "substantive acts" rendering the injunction mandatory.

Third, Government Code section 83115 requires the FPPC to investigate sworn complaints of possible violations of the Political Reform Act and to give written notice to any complainant in the event a complaint is rejected. If the Court's preliminary injunction were not stayed by the appeal, it would require the FPPC to drop its existing evaluation of the complaint filed by TheRestOfUs.org, to reject the complaint filed by TheRestOfUs.org on legal grounds, and to give TheRestOfUs.org written notice of the rejection and grounds therefor under section 83115. Ex. 6, p. 107. The Court's preliminary injunction would require the same response to all additional complaints that may come in alleging violations of Regulation 18530.9. *Id.* The rejection of complaints and corresponding subsequent written notices would be "substantive acts" rendering the injunction mandatory.

The actions described above are all steps the FPPC would have to take in response to the preliminary injunction order, but for the automatic stay created by the FPPC's appeal. With the appeal and the automatic stay in place, the status quo remains intact, and the FPPC need not take these substantive actions. Conversely, if the preliminary injunction were in effect, it would change the status quo. The injunction must thus be considered mandatory.

IV.

PRECEDENT FROM OTHER GOVERNMENT ENFORCEMENT INJUNCTION CONTEXTS

Several decisions address the mandatory/prohibitory distinction in the particular context of injunctions against state or local agency enforcement of governing provisions.

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The decision in *Johnston v. Superior Court*, 148 Cal. App. 2d 966, 967-971 (1957), involved the defendant City of Claremont's ability to enforce its residential zoning in a particular area. A commercial rezoning had been defeated by referendum (returning the area to residential zoning), but property owners challenged the validity of the referendum. *Johnston*, 148 Cal. App. 2d at 967. The trial court found the referendum void and entered an injunction purporting to restrain the city from interfering with the owners' commercial use of the property and stating that the owners had a right to issuance of commercial permits. *Id.* at 967-968. Following the city's appeal, the city continued to enforce the residential zoning notwithstanding the injunction, and the owners attempted to have the city held in contempt. *Id.* at 968. The trial court declined to hold the city in contempt, and the Court of Appeal affirmed, stating that at the time of the decree voiding the referendum, the commercial rezoning "stood repealed by the referendum proceedings," and the owners' property was thus subject to the prior zoning "limiting the use thereof to residential purposes." *Id.* at 969. The Court of Appeal continued: "Thus it appears that the decree did not have the effect of merely preserving the subject of the litigation in status quo but that it effected change in the relative position and rights of the parties by compelling the defendants to surrender their position . . . ." *Id.* The Court of Appeal correspondingly concluded the injunction was mandatory, and that it was thus stayed pending resolution of the city's appeal. *Id.* at 971. Here, just as the injunction in *Johnston* would have changed the status quo by prohibiting the defendant city from enforcing its residential zoning ordinance and was thus mandatory, the injunction here would likewise be a forced "change in the relative position and rights of the parties" and thus mandatory in effect.

At the hearing in the Superior Court, plaintiffs' counsel attempted to argue that the substantive acts identified by the FPPC as required by the preliminary injunction (described above in Section III) were merely "incidental"

to the prohibitive thrust of the preliminary injunction order. In response, the FPPC's counsel explained, to the contrary, that the public notice and guidance and consideration and determination on submitted complaints are fundamental to the FPPC's statutory and regulatory responsibilities (and that plaintiffs' argument ignored the central status quo analysis, in any event). The decision in *Johnston* is applicable here: the only act required by the injunction in *Johnston* was issuance of a commercial building permit consistent with the court's decision prohibiting enforcement of the residential zoning ordinance. *Johnston*, 148 Cal. App. 2d at 967-968. Likewise, here the preliminary injunction would require issuance of the notice and guidance materials and issuance of notices of rejection of existing and future complaints.[2/] The injunction in *Johnston* would have allowed the plaintiffs to build commercially in the face of the enjoined residential zoning ordinance -- just as the preliminary injunction here would allow unlimited contributions to flow in the face of the enjoined Regulation 18530.9. Just as the injunction in *Johnston* was thus mandatory, the injunction at issue here is also mandatory.[3/]

In *Byington v. Superior Court*, 14 Cal. 2d 68, 69-73 (1939), the California Supreme Court annulled a contempt decree entered against the City of San Francisco for appropriating an amount of water from the Tuolumne River in excess of the amount specified in a final injunction entered in a quiet title action. The limit the injunction had specified represented the capacity of

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2. It is immaterial whether the mandatory acts here were expressly spelled out in the preliminary injunction; a mandatory injunction is mandatory whether it directly or indirectly grants affirmative relief. *See, e.g., Paramount Pictures Corp.*, 228 Cal. App. 2d at 835.

3. If, as plaintiffs contend, the public notice, guidance, and issuance of rejection notices are merely "incidental" to the preliminary injunction order, query why plaintiffs' counsel sent their letters yesterday demanding that the FPPC publicize, including in open Commission session, that the preliminary injunction prevents enforcement of Regulation 18530.9.

the city's reservoirs on the project at the conclusion of the trial, but the city had been constructing increased reservoir capacity during the litigation, which was then completed during the course of the appeal. *Byington*, 14 Cal. 2d at 69-70. Notwithstanding the city's increase to its reservoir capacity *after* issuance of the injunction, the Supreme Court found the injunction to be mandatory (and thus stayed upon appeal), stating: "The effect of the injunctive decree was to compel the city to restrict its storage solely to the amount of water to which it was entitled under its prescriptive right and to subordinate certain of the city's appropriative claims to that of the plaintiff in the action and, in effect to deprive the city of the full possession and privilege of exercising such appropriative rights." *Id.* at 72-73. Correspondingly, the deprivation of the FPPC's right and duty to investigate existing complaints and enforce the regulation in effect since last November renders the present injunction mandatory.

In *Bowers v. Department of Employment*, 183 Cal. App. 2d 686, 687-688 (1960), the plaintiff agricultural employer had obtained a preliminary injunction requiring the defendant state agency to refer agricultural workers for employment. The state agency had previously refused to do so under federal law prohibiting such referral during the existence of a labor dispute. Upon the state agency's appeal, the Court of Appeal confirmed the automatic stay of the injunction, stating:

> It is apparent from the record that if the injunction were enforced the respondents would be compelled to refer workers to Bowers' ranch on application therefor. Quite obviously this would change the 'status quo' since, absent the injunction, the respondents had refused to make such referrals. It necessarily follows that since the injunction requires affirmative action, changing the 'status quo' it is mandatory in effect.

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Bowers, 183 Cal. App. 2d at 688. Similarly, the injunction here requiring FPPC action contrary to its existing conduct pursuant to its governing authority would change the status quo and is thus mandatory.

The decision in *Alvarez v. Eden Township Hospital Dist.*, 191 Cal. App. 2d 309, 310-311 (1961), is also analogous. It involved a request for a preliminary injunction to require the defendant hospital district to admit the plaintiff as a patient of a particular doctor and to prevent the hospital district from denying the doctor access to the hospital to treat her. The hospital had previously denied the doctor membership on its medical staff, and the hospital district's bylaws, rules, and regulations required that those providing treatment be qualified and members of the medical staff. The Court of Appeal identified the preliminary injunction sought as "mandatory" and proceeded to affirm the lower court's denial of the preliminary injunction. *Alvarez*, 191 Cal. App. 2d at 311-312. Just as the injunction preventing the hospital district from denying the doctor access to treat his patient was mandatory in *Alvarez*, the injunction here preventing the FPPC from denying candidates the ability to raise unlimited funds through controlled ballot measure committees is likewise mandatory.

Consistent with the analyses in these decisions, the preliminary injunction ordered by the Superior Court in this matter would disturb the status quo *both* in terms of the relationship between the parties and in terms of actual events. As a result, it is a mandatory preliminary injunction, and its effect is automatically stayed on appeal.

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V.

THE CASES CITED BY PLAINTIFFS CONFIRM THAT THE PRELIMINARY INJUNCTION ENTERED HERE IS MANDATORY[4/]

The FPPC agrees with plaintiffs (Ex. 4, p. 57) that the decision in *Sun-Maid Raisin Growers of Cal. v. Paul*, 229 Cal. App. 2d 368 (1964), is "highly instructive." In fact, it confirms the FPPC's point.

In *Sun-Maid*, the injunction at issue was a preliminary injunction against enforcement of a state agricultural agency marketing order and regulations pursuant thereto. *Sun-Maid*, 229 Cal. App. 2d at 369-370. Plaintiffs argue correctly that the court noted this injunction against government enforcement was "clearly a prohibitory injunction," but plaintiffs fail to recognize that the action in *Sun-Maid* challenging the state agency marketing order *was filed the very day it was to go into effect*, to *prevent* it from going into effect. *See id.* at 370. By contrast, Regulation 18530.9 has been in effect since November of last year. Accordingly, in this matter the decision in *Sun-Maid*

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4. Even aside from plaintiffs' lack of case authority for their position, their argument is simply an echo of the careless "blowing smoke"analysis provided by "one respected commentator," arguing:

> Nothing in the Court's order compels the FPPC to perform an affirmative act; rather, the nature of the order is exclusively to compel the FPPC to refrain from particular acts, namely to refrain from enforcing and administering the Regulation and to refrain from conducting any investigation of Plaintiffs or Plaintiff/Intervenors for alleged violation of the Regulation.

Ex. 4, p. 56 (emphasis in original). Of course, the preliminary injunction order here *does* require the FPPC to perform affirmative acts, as described in Section III, *supra*. Moreover, although affirmative acts are often associated with mandatory injunctions, they are not necessary features of such injunctions. *See, e.g., Byington*, 14 Cal. 2d at 69-73.

provides the perfect counter-example, i.e., an example of an injunction obtained to prevent a regulation *from going into effect* (prohibitory), as opposed to the injunction presently at issue, an injunction preventing enforcement of an *existing* regulation (mandatory).[5/]

Each of plaintiffs' strained attempts (Ex. 4, pp. 57-58) to reason from cases *not* addressing the mandatory/prohibitory issue is unpersuasive, and is distinguishable in any event. The decision in *Board of Police Commissioners v. Superior Court*, 168 Cal. App. 3d 420 (1985), related to an injunction against conducting an administrative hearing, but the hearing contemplated was to *revoke or suspend* existing entertaining and dance hall permits; i.e., the injunction was to *preserve* the status quo, and thus would have been considered prohibitory. *See id.* at 425. Likewise, the decision in *Crittenden v. Superior Court*, 61 Cal. 2d 565, 566 (1964) involved an injunction against a new CHP practice of issuing parking citations to plaintiffs' customers parking parallel to the highway. In *City of Santa Monica v. Superior Court*, 231 Cal. App. 2d 223, 225-226 (1965), the Court of Appeal made its decision that a writ would lie to set aside the preliminary injunction in question based on intervening Supreme Court authority and the confusing divergence of lower court decisions, not based on any particular sensitivity to the mandatory/prohibitory question. Unlike the governing cases cited by the FPPC above, none of these cases

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5. At the hearing, faced with this effect of their featured case authority *against* their position, plaintiffs attempted to deflect the argument by noting that the preliminary injunction in *Sun-Maid* was not actually entered until a date after the action was filed to prevent the agency marketing order from taking effect. This same argument was rejected, however, in *14859 Moorpark Homeowner's Ass'n v. VRT Corp.*, 63 Cal. App. 4th 1396 (1998). Contrary to plaintiffs' suggestion, it is the status quo defined as "the last actual, peaceable, uncontested status which preceded the pending controversy" by which the effect of a preliminary injunction on the status quo is determined. *14859 Moorpark Homeowner's Ass'n*, 63 Cal. App. 4th at 1407-08; *see also People v. Hill*, 66 Cal. App. 3d 320, 331 (1977).

involved a question of whether the injunction was mandatory or prohibitory, and thus none of these cases would support plaintiffs' argument. "[A]n opinion is not authority for a proposition not therein considered." *Richmond v. Shasta Community Services Dist.*, 32 Cal. 4th 409, 422 (2004) (quoting *Ginns v. Savage*, 61 Cal. 2d 520, 524 n.2 (1964)). Plaintiffs rely not just upon mere dicta, but, indeed, *upon the absence of dicta*, to support their position.[6/]

CONCLUSION

For these reasons, the FPPC respectfully requests that this Court issue a writ of supersedeas directing the Superior Court (1) to vacate its order yesterday declaring its prior preliminary injunction to be "currently in full force and effect," (2) to enter a new order denying *with prejudice* plaintiffs' ex parte application dated April 25, 2005, seeking a temporary restraining order enjoining further violations of the preliminary injunction, an order to show cause re substantial monetary sanctions, and alternatively an order to show cause re contempt, and (3) to cease any further enforcement proceedings on its

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6. At the hearing, plaintiffs also attempted to avoid the import of the undeniable fundamental alteration in the status quo from the preliminary injunction at issue by arguing that the decision in *Davenport v. Blue Cross of California*, 52 Cal. App. 4th 435 (1997), rejected evaluation of the "status quo" as the relevant test. Plaintiffs misread this decision. First, like the present case, the decision in *Davenport* addressed an injunction prohibitory in its language but mandatory in its effect, and confirmed that such an injunction is mandatory. *Id.* at 447. Second, in response to the plaintiff's narrow definition of the "status quo," the court simply confirmed the proper understanding of a mandatory injunction as including injunctions that require changes in the relationship between the parties. *Id.* at 447-448. Contrary to plaintiffs' argument, the court in *Davenport* was not purporting to overturn over a century of California jurisprudence in this area.

preliminary injunction order entered on April 18, 2005, pending this Court's determination on the FPPC's appeal of the preliminary injunction order.

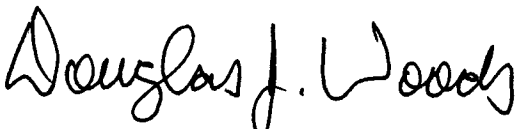
Dated: May 3, 2005

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California

LOUIS R. MAURO
Senior Assistant Attorney General

CHRISTOPHER E. KRUEGER
Supervising Deputy Attorney General



DOUGLAS J. WOODS
Deputy Attorney General

Attorneys for Petitioner

CERTIFICATE OF COMPLIANCE

I certify that the attached PETITION FOR WRIT OF SUPERSEDEAS uses a 13 point Times New Roman font and contains 7,042 words.

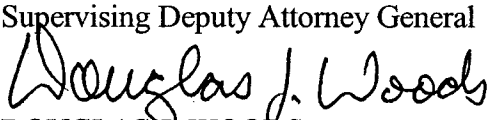
Dated: May 3, 2005

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California

LOUIS R. MAURO
Senior Assistant Attorney General

CHRISTOPHER E. KRUEGER
Supervising Deputy Attorney General



DOUGLAS J. WOODS
Deputy Attorney General
Attorneys for Petitioner

DECLARATION OF SERVICE
(C.C.P. §§ 1011, 1012, 1012.5, 1013)

Case Name: ***California Fair Political Practices Commission v. The Superior Court of Sacramento County - Citizens to Save California***
Case No.
Lower Court Case No. **05AS00555**

I declare: I am employed in the County of Sacramento, California. I am 18 years of age or older and not a party to the within entitled cause; my business address is 1300 I. Street, Sacramento, California.

On May 3, 2005, I served the attached

PETITION FOR WRIT OF SUPERSEDEAS; REQUEST FOR IMMEDIATE STAY OF ORDER DATED MAY 2, 2005, DECLARING PRELIMINARY INJUNCTION STAYED ON APPEAL TO BE CURRENTLY IN EFFECT, PENDING DETERMINATION OF THIS PETITION; AND MEMORANDUM OF POINTS AND AUTHORITIES (ACCOMPANIED BY EXHIBITS IN SUPPORT THEREOF)

in said cause, by placing a true copy thereof enclosed in a sealed envelope and served as follows:

___ United States mail by placing such envelope(s) with postage thereon fully prepaid in the designated area for outgoing mail in accordance with this office's practice, whereby the mail is deposited in a United States mailbox in the City of Sacramento, California, after the close of the day's business

_X_ California Overnight Service (Overnight Courier)

___ Facsimile at the following Number:

___ Personal Service, via Capitol Couriers, at the below address(es):

to the parties addressed as follows:

James R. Parrinello, Esq.
Christopher E. Skinnell
Nielsen, Merksamer, Parrinello, Mueller & Naylor LLP
591 Redwood Highway, Suite 4000
Mill Valley, CA 94941
Courtesy E-Mail: jparrinello@nmgovlaw.com
COUNSEL FOR PLAINTIFFS, CITIZENS TO SAVE CALIFORNIA, A COALITION OF BUSINESS AND TAXPAYER ORGANIZATIONS, A CALIFORNIA PUBLIC BENEFIT CORPORATION, AND KEITH RICHMAN, M.D.

AND

in said cause, by placing a true copy thereof enclosed in a sealed envelope and served as follows:

___ United States mail by placing such envelope(s) with postage thereon fully prepaid in the designated area for outgoing mail in accordance with this office's practice, whereby the mail is deposited in a United States mailbox in the City of Sacramento, California, after the close of the day's business

___ California Overnight Service (Overnight Courier)

___ Facsimile at the following Number:

_X_ Personal Service, via Capitol Couriers, to the parties addressed as follows:

Charles H. Bell, Jr., Esq.
Bell, McAndrews & Hiltachk, LLP
455 Capitol Mall, Suite 801
Sacramento, CA 95814
Courtesy E-Mail: cbell@bmhlaw.com
COUNSEL FOR PLAINTIFFS/INTERVENERS, ARNOLD SCHWARZENEGGER, GOVERNOR SCHWARZENEGGER'S CALIFORNIA RECOVERY TEAM, SENATOR JOHN CAMPBELL, RESCUE CALIFORNIA FROM BUDGET DEFICITS; AND TAXPAYERS FOR RESPONSIBLE PENSIONS

Department 32
The Honorable Shelleyanne W.L. Chang
Sacramento County Superior Court
720 9th Street
Sacramento, CA 95814-1398

I declare under penalty of perjury under the laws of the State of California, that the foregoing is true and correct, and that this declaration was executed at Sacramento, California on May 3, 2005.

CYNTHIA FULKERSON